STATE OF MICHIGAN

COURT OF APPEALS

JOAN ROSALES PALACIO,

Plaintiff-Appellant,

v

JEAN L. AIKENS,

Defendant-Appellee,

and

MONIQUE ANGELISE AIKENS,

Defendant.

UNPUBLISHED
May 7, 2002

No. 228165
Ingham Circuit Court
LC No. 98-088503-NI

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's March 17, 2000, order granting defendant-mother Jean L. Aikens' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff was involved in an automobile accident with defendant-daughter Monique Angelise Aikens and was awarded a default judgment against her.[1] Plaintiff then filed a first amended complaint adding defendant-mother as a defendant and alleging liability under the owner's liability statute, MCL 257.401, because defendant-mother held title to the vehicle defendant-daughter was driving when the accident occurred. The owner's liability statute provides in pertinent part:

> The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge. It is presumed that the motor vehicle is being

[1] The trial court entered the default judgment against defendant-daughter on October 14, 1998.

> driven with the knowledge and consent of the owner if it is driven at the time of the injury by his or her spouse, father, mother, brother, sister, son, daughter, or other immediate member of the family. [MCL 257.401(1).]

Defendant-mother moved for summary disposition under MCR 2.116(C)(10) on October 4, 1999, and supported her motion with deposition testimony by defendant-daughter and herself indicating that defendant-daughter did not have permission to drive the vehicle on the day of the accident. According to the record, defendant-mother had taken away defendant-daughter's keys and had left the vehicle sitting in the parking lot at defendant-daughter's apartment only because it would not start. Unbeknownst to defendant-mother, defendant-daughter had an extra set of keys made, and had enlisted the aid of a neighbor to start the vehicle on the day of the accident.

Plaintiff opposed this motion by emphasizing the inconsistencies in defendant-daughter's and defendant-mother's deposition testimony regarding the exact time defendant-mother took away defendant-daughter's keys and by arguing that defendant-mother and defendant-daughter's testimony was self-serving and should be disbelieved. She also argued that lack of permission was an affirmative defense that defendant-mother waived by failing to plead it in her first responsive pleading. MCR 2.111(F)(3). The trial court rejected plaintiff's arguments and granted defendant-mother's motion for summary disposition, finding "clear, unequivocal testimony, which was unrebutted, that [defendant-daughter] did not have permission to use" defendant-mother's vehicle on January 14, 1997.

In reviewing a grant of summary disposition, we examine the record de novo to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Educational Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence, viewed in the light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Belvidere Twp v Heinze*, 241 Mich App 324, 327-328; 615 NW2d 250 (2000). To defeat a summary disposition motion, the nonmovant must present documentary evidence establishing the existence of a material dispute of fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The trial court may not make findings of fact or weigh credibility at the summary disposition stage. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

"To subject an owner to liability under the [owner's liability] statute, an injured person need only prove that the defendant is the owner of the vehicle and that it was being operated with the defendant's knowledge and consent." *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998). The presumption of consent that arises when the driver is one of the owner's family members is rebuttable, and may disappear on a showing of clear, positive and uncontradicted evidence that the owner did not consent. *Krisher v Duff*, 331 Mich 699, 708; 50 NW2d 332 (1951).[2]

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[2] Our learned dissenting colleague asserts that we have not correctly interpreted our Supreme Court's decision in *Krisher, supra*, contending that the statutory rebuttable presumption may (continued…)

In our opinion, summary disposition was inappropriate in this case because plaintiff presented evidence establishing the existence of a material factual dispute regarding whether defendant-daughter had permission to drive defendant-mother's vehicle. During their deposition testimony, defendant-mother and defendant-daughter testified that defendant-daughter did not have permission to drive the vehicle on the date of the accident, January 14, 1997, because defendant-mother had taken away her keys to the vehicle. Specifically, defendant-mother testified that she had taken away defendant-daughter's vehicle privileges about two to three weeks before the accident because of a dispute over the individual defendant-daughter was dating. Although defendant-daughter was unclear with regard to exact dates during her deposition testimony, she also indicated that shortly after Christmas 1996 her vehicle privileges were taken away for between two to three weeks.

However, in response to defendant-mother's motion for summary disposition, plaintiff presented defendant-mother's answers to plaintiff's second interrogatories. In her answers to the interrogatories, defendant-mother conceded that she loaned the vehicle in question to defendant-daughter a few months before the accident in January 1997, and that she was aware that it was "[u]sed regularly [by defendant-daughter] except when taken away." It is undisputed that at the time of the accident, the vehicle was parked at defendant-daughter's residence. Further, defendant-mother admitted in her interrogatories that defendant-daughter was accustomed to using the vehicle without first obtaining defendant-mother's specific approval or permission. Likewise, defendant-daughter's deposition testimony regarding the exact date her mother allegedly revoked her permission to use the vehicle is equivocal at best. Similarly, at oral argument the panel was advised that defendant-daughter's father, Andrew Aikens, visited his insurance agent on the day of the accident to purchase insurance for the vehicle and named defendant-daughter as the primary driver.[3]

Further, plaintiff made out a prima facie case under the owner's liability statute by proving that defendant-mother owned the vehicle and that the vehicle was being driven by defendant-daughter at the time of the accident. In other words, the statutory presumption of consent arose requiring that the issue of consent be submitted to the jury to determine whether defendant-mother can rebut it with clear, positive and uncontradicted evidence. In our view, defendant-mother's general denial of consent is not "clear, positive and uncontradicted evidence" sufficient to overcome the strong presumption of consent the owner's liability statute mandates.

(…continued)

only be overcome by "positive, unequivocal, strong and credible" evidence. In contrast, we have cited the standard as requiring clear, positive and uncontradicted evidence. In our view, this comparison presents nothing more than a subtle distinction without a difference. In a case such as this, where the credibility of defendant-mother and defendant-daughter is seriously in dispute, the case should be presented to the jury. See *Krisher*, *supra* at 713.

[3] The trial court was similarly apprised of this fact during the March 1, 2000, hearing on defendant-mother's motion for summary disposition. In his deposition, Andrew Aikens confirmed that he visited his insurance agent at approximately 3:00 p.m. on January 14, 1997, and procured insurance for the vehicle defendant-daughter was driving when she was involved in the accident earlier that day. Andrew Aikens denied being aware of defendant-daughter's accident when he purchased the insurance. Andrew Aikens' deposition testimony was taken on May 22, 2000, after the trial court entered its judgment in this case.

Under the circumstances, we believe the trial court erred in dismissing the case. Instead, the question whether defendant-daughter had defendant-mother's permission to drive the vehicle should be submitted to the jury. Accordingly, the trial court's order granting defendant-mother's motion for summary disposition is reversed.

Given our disposition of this issue, we need not consider plaintiff's other issues raised on appeal. Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell